No. 14-449, 450

In the Supreme Court of the United States

STATE OF KANSAS,

Petitioner,

v.

JONATHAN D. CARR AND
REGINALD DEXTER CARR, JR.,

Respondents.

On Writ of Certiorari to the Supreme Court of Kansas

BRIEF FOR PETITIONER

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. MCALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com
Counsel for Petitioner

June 2015

Becker Gallagher Cincinnati, OH Washington, D.C. · 800.890.5001

CAPITAL CASE

QUESTIONS PRESENTED

1. Whether the trial court's decision not to sever the sentencing phase of the co-defendant brothers' trial here—a decision that comports with the traditional approach preferring joinder in circumstances like this—violated an Eighth Amendment right to an "individualized sentencing" determination and was not harmless in any event?

2. Whether the Eighth Amendment requires that a capital-sentencing jury be *affirmatively instructed* that mitigating circumstances "need not be proven beyond a reasonable doubt," as the Kansas Supreme Court held here, or instead whether the Eighth Amendment is satisfied by instructions that, in context, make clear that each juror must individually assess and weigh any mitigating circumstances?

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OPINIONS BELOW

The decisions of the Kansas Supreme Court are reported, *State v. R. Carr*, 331 P.3d 544 (Kan. 2014), *State v. J. Carr*, 329 P.3d 1195 (Kan. 2014), and are reproduced as appendices to the respective Petitions for Writ of Certiorari.

JURISDICTION

The Kansas Supreme Court decided these cases July 25, 2014. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution provides in relevant part that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, "... nor shall any State deprive any person of life, liberty, or property without due process of law ...." U.S. Const. amend. XIV.

STATEMENT OF THE CASE[1]

A. The Multiple Violent Crimes Underlying These Cases.

Reginald Carr, Jr., and Jonathan Carr, brothers, were charged, jointly tried, convicted, and sentenced for crimes committed in a series of *three* violent incidents in December 2000 in Wichita, Kansas.

1. **The Schreiber Carjacking**. In the first incident, on December 7, 2000, the respondents carjacked Andrew Schreiber and drove to various ATMs, forcing Schreiber at gunpoint to withdraw money from his bank account. The Carrs ultimately abandoned Schreiber in a rural area after taking his watch, striking him in the head with a gun, and shooting out the tires of his vehicle. RC App. 29-32.

2. **The Walenta Murder**. Four days later, the respondents followed Linda Ann Walenta to her home. As she pulled into her driveway, one of the Carrs approached her vehicle and pointed a gun through the driver's side window. Walenta attempted to reverse her vehicle and was shot. She survived for a few days, but died from the shooting. RC App. 33-35.

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[1] Kansas will refer to the appendices to the Petitions for Writ of Certiorari by utilizing "RC App." for *Kansas v. Reginald Carr*, No. 14-450, and "JC App." for *Kansas v. Jonathan Carr*, No. 14-449. When the cited material in the appendices is the same, Kansas cites the "RC App." The parties deferred the printing of the Joint Appendix until after the Respondents' briefs were filed. After the printing and filing of the Joint Appendix, Kansas filed this brief substituting "JA" citations where possible.

3. **The Birchwood Rapes, Torture, Robberies, and Multiple Murders**. The third and final incident began on December 14, 2000, at a Birchwood neighborhood home shared by three young men, Aaron S., Brad H., and Jason B. Two women, Holly G. and Heather M., also were at the home that night. RC App. 35.

Shortly after the occupants of the house went to bed, the Carrs, armed with guns, forced their way inside. They rounded up the occupants, gathered them into one bedroom, and demanded money. When the victims said they had no cash, the Carrs demanded ATM cards. The Carrs also ordered the victims to remove their clothes and forced all five into a closet. RC App. 35-36.

The Carrs then removed the two women from the closet and forced them to perform oral sex on each other and to penetrate each other with their fingers, while the Carrs watched and gave instructions. Next, the Carrs brought the male victims out of the closet one at a time and ordered each to have sexual intercourse with Holly G. The Carrs threatened to shoot the men if they did not perform. When one victim said he would not do it, he was struck in the back of the head with a hard object. RC App. 37-38.

The Carrs next ordered each of the men to have sexual intercourse with Heather M. After these numerous coerced sex acts, Reginald drove Brad H. to several ATMs to withdraw money. While they were gone, Jonathan raped Holly G., and then raped or attempted to rape Heather M. RC App. 38-39, 61.

Brad H. and Reginald returned after about 30 minutes, and Reginald then took Jason B. to two ATMs to withdraw money. Upon their return, Reginald took Holly G. to several ATMs to withdraw money. Finally, Reginald returned with Holly G. and took Aaron S. to withdraw money. RC App. 39-41, 62-63.

When Reginald and Aaron S. returned, Reginald raped Holly G. and forced her to perform oral sex. Meanwhile, Jonathan raped Heather M. again, and then raped Holly G. again. RC App. 41-42.

After these rapes, the Carrs forced the men into the trunk of Aaron S.'s car, put Heather M. in the back seat of the car, and put Holly G. in the passenger seat of Jason B.'s truck. Jonathan drove Aaron S.'s car, followed by Reginald driving Jason B.'s truck. The Carrs drove to a soccer field and ordered all of the victims out, forcing them to kneel in a line. The Carrs then shot each of the five victims in the back of the head, and drove away. RC App. 43-44, 57-58.

Miraculously, Holly G. survived. The bullet fired at her head fractured her skull, but did not enter her brain, apparently because a plastic hairclip she was wearing deflected the bullet. The impact stunned Holly G., but she remained kneeling until one of the Carrs kicked her to the ground. She could hear the Carrs talking, and felt the impact when one of them drove Jason B.'s truck over her body as they left. RC App. 44-46, 57.

After the Carrs left the murder scene, Holly G. got up and used the only piece of clothing she had in a futile effort to bandage Jason B.'s fatal head wound. She then spotted lights from a house in the distance.

Naked, barefoot, shot in the back of the head, and having been run over by a vehicle, she somehow managed to travel more than a mile through snow and over fences to reach the house. RC App. 44, 57, 496.

Holly G. pounded on the door and awoke the homeowners, who took her inside and called 911. Holly G. survived her numerous serious injuries. The other four victims, however, died. Holly G. provided police with details of these heinous crimes and eventually would testify against the Carrs at trial. RC App. 44-45, 57-58.

Soon after the murders the police apprehended Reginald. When he was arrested, Reginald had a gas card bearing Jason B.'s name, a watch that belonged to Heather M., and $996. Inside the apartment where the police arrested Reginald, they found numerous additional items belonging to the four murder victims and Holly G. RC App. 51-52.

Meanwhile, Jonathan was at a friend's apartment. When the friend and her mother saw news footage of Reginald's arrest and learned that police were looking for another individual, they grew suspicious of Jonathan and called police. Police arrived and apprehended Jonathan. Like Reginald, Jonathan had property of the victims, including the engagement ring Jason B. had purchased for, but not yet given to, Holly G. RC App. 52-55.

B. The Extensive Trial and Detailed Penalty Proceedings.

The Carrs were charged with and convicted of numerous offenses arising from their crime spree, including the felony murder of Walenta, and four

capital murders of Aaron S., Brad H., Jason B., and Heather M. RC App. 25-27. They were tried jointly in the guilt phase.

After both Carrs were convicted of capital murder, the court conducted a joint penalty proceeding. The State's case-in-chief for the penalty phase consisted solely of relying on the State's guilt-phase evidence already presented. JA 73-74. The State argued that the guilt-phase evidence established four aggravating factors applicable to each Carr:

> (1) That the defendant knowingly or purposely killed or created a great risk of death to more than one person.
>
> (2) That the defendant committed the crime for the defendant's self or another for the purpose of receiving money or any other thing of monetary value.
>
> (3) That the defendant committed the crime in order to avoid or prevent a lawful arrest or prosecution.
>
> (4) That the defendant committed the crime in an especially heinous, atrocious or cruel manner.

RC App. 502-503, 505-506.

In mitigation, the Carrs offered extensive evidence of their childhoods, including various events, incidents, and experiences. They presented that evidence through the testimony of family members, in particular their mother, sister, an aunt and two cousins. Sentencing Tr. Vol. 41-A, at 36-138, Vol. 41-B, at 31-48 (mother); Vol.

41-B, at 64-121 (sister); Vol. 41-B, at 122-141, Vol. 43-B, at 52-142 (aunt); Vol. 42, at 106-141 (cousin); Vol. 45-B, at 142-152, Vol. 46, at 5-26 (cousin). Each Carr also presented a forensic psychologist to testify as an expert about the psychological effects each Carr's childhood had on him. Sentencing Tr. Vol. 43-A, at 17-123, Vol. 43-B, at 5-50 (Dr. Reidy for Reginald); Vol. 45-A, at 4-145, Vol. 45-B, at 4-140 (Dr. Cunningham for Jonathan). They also presented a retired medical doctor, Dr. Preston, as an expert witness, who opined that both Reginald and Jonathan showed abnormal brains on PET scans performed in preparation for these cases. Sentencing Tr. Vol. 42, at 6-105.

Reginald presented evidence that he tries to be a good father to his three children. Sentencing Tr. Vol. 42, at 113-114, 172-173, 181. Jonathan presented evidence that he was considered a good kid growing up, and some evidence that he was negatively influenced by his brother. *E.g.*, Sentencing Tr. Vol. 41A, at 116; Vol. 42, at 149; Vol. 43-A, at 6.

The only evidence that the State responded to with rebuttal evidence was the expert testimony that each brother showed brain abnormalities. In that regard, the State presented a neuroradiologist, Dr. Pay, who testified that the PET scans of Reginald and Jonathan showed normal brains. Sentencing Tr. Vol. 46, at 34-90. In any event, in closing argument, Jonathan's counsel acknowledged that the "brain injury" evidence was not intended to show that a brain injury caused Jonathan to commit the crimes or somehow excused his commission of the crimes. JA 429.

The State did not contest that the Carrs had troubled childhoods, that their parents had many problems, that Reginald took some actions to be a good parent to his children, that Jonathan was considered by some to be a good kid growing up, or that Jonathan was influenced at times by his older brother. All of that evidence was essentially uncontested.

At the close of the sentencing phase evidence, the trial court conducted a jury instruction conference that was extremely short, taking up less than five pages in the transcript. JA 373-376. Neither defendant objected to the instructions on mitigation. Nor did either defendant propose a mitigation instruction that said anything about burden of proof. Nor did either defendant suggest or argue that the instructions as proposed would confuse the jurors because the instructions included a "beyond a reasonable doubt" burden of proof for aggravating factors but no burden of proof for mitigating circumstances. *Id.*

The trial court instructed the jury that, in determining the sentence for each defendant, "you should consider and weigh everything admitted into evidence during the guilt phase or the penalty phase of this trial that bears on either an aggravating or a mitigating circumstance." Instruction No. 2, RC App. 500. Further, the trial court emphasized to the jury that "[y]ou must give separate consideration to each defendant. Each is entitled to have his sentence decided on the evidence and law which is applicable to him. Any evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant." Instruction No. 3, RC App. 501.

With respect to mitigation, the trial court instructed the jury that "you may consider sympathy for a defendant," and the "appropriateness of exercising mercy can itself be a mitigating factor ...." Instructions No. 6, 8, RC App. 503, 507. The court went on to emphasize that the

> determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of the case. Mitigating circumstances are to be determined by each individual juror when deciding whether the State has proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her decision.

Instructions No. 6, 8, RC App. 504, 507. The trial court then instructed the jury on six statutory mitigating circumstances (no prior criminal history, mental or emotional disturbance, defendant was a relatively minor accomplice, extreme duress or domination by another, term of imprisonment will protect the public, and age of the defendant), but made clear that mitigating circumstances, unlike aggravating factors, were not limited to the statutory list: "You may further consider as a mitigating circumstance *any other factor* which you find may serve as a basis for imposing a sentence of less than death. Each of you must consider every mitigating circumstance found to exist." Instruction Nos. 6, 8, RC App. 505, 508 (emphasis added).

During closing arguments, neither Carr tried to put the blame on the other, nor did either Carr argue that he was less culpable than the other. Instead, both Carrs focused on evidence of their childhoods, arguing that such a background favored giving them life sentences rather than death. JA 405-423, 426-433.

Furthermore, the Carrs' closing arguments emphasized the individuality of each defendant, with counsel for Reginald arguing at length about the reasons to show mercy to Reginald. Referring to "Reggie" numerous times, Reginald's counsel detailed the mitigating evidence relating to "Reggie," and never once mentioned "Jonathan." JA 405-423. Similarly, though briefer overall in his closing, Jonathan's counsel referred to Reginald only once and even then not by name, when he mentioned that Jonathan "has come to court every day, unlike his brother." JA 431. Also, Jonathan's counsel emphasized that "[y]ou know, any one of you can decide to save this young man's life. Any one of you." JA 433.

Simply put, the vast majority of sentencing phase evidence was not antagonistic as between the two Carrs, nor did either Carr, much less both, attempt in closing argument to put the blame for the crimes on the other. Instead, each Carr focused his efforts to establish mitigating circumstances on demonstrating his individual history, his upbringing, his family situation, and his life experiences. JA 405-423, 426-433.

The jury explicitly found the existence of all four of the aggravating factors the State alleged for each defendant, and that those factors were not outweighed by any mitigating circumstances. Verdict Form (1),

JA 461-462 (Reginald); JA 477-478 (Jonathan). The jury declined to utilize either of the other two verdict forms provided. *See* Verdict Form (2), JA 463 (Reginald) (to be used if the jury found no aggravating circumstances had been proved beyond a reasonable doubt); JA 479 (Jonathan) (same); Verdict Form (3), JA 464 (Reginald) (to be used if the jury was unable to reach a unanimous verdict sentencing the defendant to death); JA 480 (Jonathan) (same).

The trial court sentenced both Reginald and Jonathan to death for the capital murder convictions. The court gave each a life sentence for the Walenta murder, and additional terms of imprisonment for other convictions. RC App. 27.

C. The Kansas Supreme Court Reversed The Death Sentences.

The Kansas Supreme Court affirmed 32 of Reginald's 50 convictions, including one count of capital murder. RC App. 28. The court also affirmed 25 of Jonathan's 43 convictions, including one count of capital murder. JC App. 26.

But a majority of the court reversed the death sentences, finding three constitutional errors in the penalty proceedings, two of which are under review here: (1) each Carr's Eighth Amendment right to an individualized sentencing determination was violated by the trial court's decision not to sever their penalty phase proceedings, RC App. 404-414, JC App. 45; and (2) the trial court's failure to affirmatively inform the jury that mitigating circumstances need not be proved beyond a reasonable doubt violated the Eighth

Amendment. RC App. 445-446, JC App. 47.[2] This Court granted review of these two issues.[3]

One justice dissented on both issues, and would have affirmed the death sentences. RC App. 483-497; JC App. 65-66. Another justice dissented only from the jury instructions holding. RC App. 481-483; JC App. 63-65.

1. The Majority Ruled That Failure To Sever The Penalty Phase Was Constitutional Error.

a. Failure to Sever for Reginald Carr

For the severance issue, the Kansas Supreme Court only discussed Reginald's claim in full. The court began by observing that Reginald asserted the failure to sever "violated his Eighth Amendment to the United States Constitution right to an individualized capital sentencing determination ...." RC App. 404-405. The court then asserted that "J.Carr makes at least one distinct argument in favor of severance in the penalty phase: He asserts the joint trial inhibited the jury's individualized consideration of him because of family

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[2] In deciding this issue, the Kansas Supreme Court relied on its opinion in *State v. Gleason*, 329 P.3d 1102 (2014), released only one week earlier, to explain its reasoning. This Court granted review of *Gleason*, No. 14-452, which is being briefed and argued simultaneously with these cases.

[3] The third constitutional error the Kansas Supreme Court found was that the Carrs' Sixth Amendment right to confrontation was violated by the admission of hearsay evidence in the sentencing phase. RC App. 421-424. The State included that question in its petitions, but the Court has taken no action on that question.

characteristics tending to demonstrate future dangerousness that he shared with his brother." *Id.* at 405. The court also noted that "[a]lthough R. Carr's visible handcuffs are not specified as another source of prejudice to J. Carr, they also factor into our decision ...." *Id.*

The Kansas Supreme Court purported to acknowledge that the Eighth Amendment "does not categorically mandate separate penalty phase proceedings for each codefendant in a death penalty case." RC App. 406. The court then proceeded to identify what appear to be its three main rationales for finding error in the trial court's decision not to sever the penalty phase here:

(1) Because capital sentencing is about moral culpability, "mercy from a single juror is all it takes to send a capital defendant to prison rather than to execution," thus "[m]ercy may overcome even the most obvious imbalance between forceful evidence of aggravators from the State and a defense mitigation case that is so weak it would not pull the skin off a rice pudding," RC App. at 408-409;

(2) J. Carr's lawyer cross-examined the codefendants' sister, Temica, and elicited a statement from Temica that Reginald may have told her, during

a visit to him in jail, that he was the shooter, *id.* at 409-410[4]; and

(3) "[T]his is a rare instance in which our usual presumption that jurors follow the judge's instructions is defeated by logic." *Id.* at 411. The court's only explanation for the third rationale was that "the maelstrom that was [the codefendants'] family and their influence on and interactions with one another, including testimony that tended to show that R. Carr was a corrupting influence on J. Carr," *id.*, required the legal conclusion that "the penalty phase evidence simply was not amenable to orderly separation and analysis." *Id.*

After concluding that the failure to sever the penalty phase violated the "Eighth Amendment right to an individualized capital sentencing," RC App. 412, the Kansas Supreme Court very briefly considered the following question: "Can this error be considered harmless?" *Id.* The court articulated the harmless error standard as "not whether a death penalty sentence would have been imposed but for the error," *id.* at 413,

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[4] The court recognized that Temica's testimony might have been admitted against R. Carr (who called her as his mitigation witness) in a penalty phase proceeding even if severed, RC App. 409, that there is no evidence the State was aware that she might give such testimony (it was very "possible that the State was completely unaware of R. Carr's admission to Temica," *id.* at 410), and that when the State did cross-examine Temica she was vague and equivocal: "I believe I heard him tell me something like that. I don't remember ... like when he asked me who he shot and all that, I don't remember who was, you know, shot by who." *Id.* Furthermore, the vast majority of Temica's testimony was about family dynamics and childhood experiences, because she is the oldest child in the family. *See* JA 131-158.

but instead as "whether the death verdict actually rendered in this trial was surely unattributable to the error." *Id.*

The court's sole sentence of "rationale" applying this standard consists of the following:

> The evidence that was admitted, the especially damning subset of it that may not have been admitted in a severed proceeding, and the hopelessly tangled interrelationship of the mitigation cases presented by the defendants persuades us that the jury could not have discharged its duty to consider only the evidence limited to one defendant as it arrived at their death sentences.

Id. Thus, the Kansas Supreme Court concluded that "[w]e cannot say that the death verdict was unattributable, at least in part, to this error," *id.*, and it reversed Reginald's death sentence.

b. Failure to Sever for Jonathan Carr

For Jonathan Carr's claim regarding severance, the Kansas Supreme Court said very little, summarizing its conclusion: "A majority of six members of the court" find a constitutional violation (1) "for the reasons explained in Section P1 of the R. Carr opinion," (2) "because of the family circumstances argument raised by J. Carr," and (3) "the prejudice to J. Carr flowing from R. Carr's visible handcuffs during the penalty phase." JC App. 45. With that, the Kansas Supreme Court reversed Jonathan's death sentence.

2. The Majority Ruled That The Instructions Violated The Eighth Amendment Because They Failed To Affirmatively Inform The Jury That Mitigating Circumstances Need Not Be Proven Beyond A Reasonable Doubt.

The Kansas Supreme Court resolved the mitigation instruction question on the basis of its then recent decision in *Kansas v. Gleason*, and commented only minimally as follows:

> When nothing in the instructions mentions any burden other than "beyond a reasonable doubt," jurors may be "prevented from giving meaningful effect or a reasoned moral response to" mitigating evidence, implicating a defendant's right to individualized sentencing under the Eighth Amendment. *State v. Gleason*. This is unacceptable.
>
> Were we not already vacating R. Carr's death sentence on Count 2 and remanding the case because of Judge Clark's failure to sever the penalty phase, error on this issue would have forced us to do so.

RC App. 446 (full citations omitted).

3. One Dissent Disagreed That Failure To Sever Was Constitutional Error And Both Dissents Disagreed That There Was Error In The Instructions.

The dissenting justice[5] on severance observed that the "majority's discussion finding an Eighth Amendment violation" in the trial court's failure to sever the penalty phase proceedings was "logically flawed and, at times, difficult to follow." RC App. 487. Further, with regard to harmless error, "the majority's nearly nonexistent analysis goes entirely awry." *Id.*

The dissent found any concern about codefendants attempting to put the blame on each other both insufficient to justify severance generally, and misplaced here, especially, because "most of the two brothers' mitigating evidence was not antagonistic." RC App. 489. Furthermore, the fact that Temica's statements "might not have been admitted in the penalty phase of a separate trial" did not create a "constitutional violation." *Id.*

The dissent harshly criticized the majority's "unsupported" analysis that the "jury did not follow its explicit instructions" to consider each defendant individually. RC App. 490. Indeed, the "majority's logic overlooks that this jury had already demonstrated its ability to differentiate ... when it refused to convict Jonathan Carr on counts related to the Schreiber incident." *Id.* "Instead, the majority vaguely offers a

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[5] The dissenting justice on this issue was former Kansas Supreme Court Justice Nancy Moritz, who is now a judge on the U.S. Court of Appeals for the Tenth Circuit.

statement I cannot even loosely characterize as logical ...." *Id.* Thus, the dissent simply could "not agree with the highly flawed and limited rationale offered by the majority for finding constitutional error ...." *Id.*

Assuming for the sake of argument that error had occurred, the dissent "strongly disagree[d] with the majority's conclusory, one-paragraph harmless-error analysis ...." RC App. 491. "Reginald Carr's death penalty verdict must be attributed to the overwhelming evidence of extreme terror, humiliation, pain, and anguish inflicted upon the multiple victims." *Id.* In fact, the dissent had "no hesitation whatsoever in concluding that when viewed in light of the record as a whole [any prejudice from joinder] had little, if any, likelihood of changing the jury's ultimate conclusion ...." *Id.* at 493. The jurors "heard overwhelming and convincing evidence of heinous and atrocious acts committed by Reginald Carr," including from "Holly, the unintended survivor of this savage attack. It is nearly impossible to convey in a few short paragraphs the overwhelming nature of that evidence." *Id.* at 493-494.[6]

The dissent concluded that the trial court did not err in refusing to sever J. Carr's penalty phase, JC Pet. App. 65, and that, "even considering a joinder error in the penalty phase, I would affirm the jury's imposition of the death penalty for Jonathan Carr." *Id.* at 65-66. The "mitigating evidence simply pales in comparison to the aggravating circumstances," *id.* at 66, and thus

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[6] The dissent summarized that evidence in seven paragraphs, RC App. 494-496, but in the interests of brevity the State addresses that summary below in Section I.B.2. of the Argument.

"beyond a reasonable doubt [] the jury's decision to impose the death penalty was not attributable to any joinder error below." *Id.* To the contrary, "the jury imposed a sentence of death because it understood that the horrendous circumstances called for that sentence." *Id.*

With respect to the mitigation instructions issue, two Justices dissented, with Justice Biles issuing a shortened version of his dissent in *Kansas v. Gleason*.[7]

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[7] Kansas' opening brief in *Kansas v. Gleason* describes the dissent in *Gleason*. Kansas will not repeat that discussion here.

SUMMARY OF THE ARGUMENT

Nothing in this Court's precedents mandates severance in capital cases as an Eighth Amendment requirement to insure defendants receive individualized sentencing. The Kansas Supreme Court's reasoning and holding in these cases—which effectively makes severance mandatory, given that codefendants are likely to always try to lessen their own moral culpability in comparison to each other—is contrary to the long-standing preference for joint trials in the criminal justice system. *Richardson v. Marsh*, 481 U.S. 200, 209-210 (1987); *Zafiro v. United States*, 506 U.S. 534 (1993). Nothing about the Carrs' penalty proceedings required severance here.

"Joint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit." *Richardson*, 481 U.S. at 210. But, "[e]ven apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id.* Furthermore, "it seems obvious that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase: if two different juries were to be required, such testimony would have to be presented twice, once to each jury." *Lockhart v. McCree*, 476 U.S. 162, 181 (1986).

The "individualized sentencing" principle is not incompatible with joint penalty phase proceedings, and may even be enhanced in such proceedings. The same considerations that favor joinder in the guilt phase

remain in play during the sentencing phase. Forcing the States to utilize multiple, separate, and largely repetitive sentencing hearings before the same jury or even different juries would have several undesirable consequences. Such an approach could permit one or more capital defendants to preview the State's penalty phase evidence and arguments, increasing the possibility of inconsistent and inequitable verdicts. Such an approach also would greatly increase the time commitments of jurors and the resources required to try these proceedings. Lastly, mandating separate, repetitive proceedings also could work to the detriment of victims who might have to testify in multiple proceedings.

Instead, the rule is that jury instructions are sufficient to cure any risk of prejudice from joinder. *Zafiro*, 506 U.S. at 540-541. Contrary to the holding of the Kansas Supreme Court, juries can be presumed to follow instructions explicitly informing them each defendant must be given *individualized* consideration in determining the sentences. This Court long has embraced and emphasized the presumption that juries follow their instructions. *Richardson*, 481 U.S. at 211; *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009) (*per curiam*); *Blueford v. Arkansas*, 566 U.S. ___, 132 S. Ct. 2044, 2051 (2012). No logical rationale exists to disregard the presumption here.

Further, there is no Eighth Amendment right to have a capital sentencing jury consider mercy. *California v. Brown*, 479 U.S. 538 (1987) (jury can be instructed not to consider mercy or sympathy); *see also Saffle v. Parks*, 494 U.S. 484 (1990) (contention that Eighth Amendment requires jury be allowed to base

capital sentencing decision on sympathy for defendant would be a "new rule" not applicable on federal habeas review). As a result, the Eighth Amendment cannot mandate separate sentencing proceedings on the rationale that "mercy" can only be fully considered in separate proceedings. Again, the Kansas Supreme Court erred.

Finally, joinder is erroneous only when a defendant can demonstrate actual and substantial prejudice, an extremely high standard, and one that is rarely met. Here, neither Carr can meet that high standard. Moreover, any potential risk was cured both by the instructions and the separate verdict forms. The Kansas Supreme Court's flimsy "rationales" for its contrary conclusions simply do not withstand scrutiny. Ultimately, the evidence supporting a death sentence for each defendant in this case was overwhelming. The repeated torture each defendant inflicted on the victims was horrific.

Just as there was no basis in the Court's precedents for the Kansas Supreme Court's severance rulings, there likewise is nothing in the Court's precedents justifying the Kansas court's holding that the Eighth Amendment requires a jury in a death penalty proceeding to be *affirmatively instructed* that mitigating circumstances need *not* be proven beyond a reasonable doubt. Indeed, that holding stands in stark contrast to this Court's precedents, and is both legally and logically insupportable. Instead, the controlling constitutional standard here is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence."

Boyde v. California, 494 U.S. 370 (1990). The *Boyde* Court relied on three factors to make that determination, and those three factors demonstrate there was no error here.

First, the language of the instructions did not impose *any* burden of proof on the Carrs to prove mitigating circumstances. In *Buchanan v. Angelone*, 522 U.S. 269 (1998), the Court made clear that the Eighth Amendment does not require detailed instructions on mitigation, or that any particular requirements for mitigation be included in the jury instructions. Instead, the Court emphasized that, with respect to mitigation, the Eighth Amendment only requires "that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant evidence." 522 U.S. at 276. Otherwise, "the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence." *Id. See also Weeks v. Angelone*, 528 U.S. 225 (2000) (same holding).

Second, in this case, as in *Boyde*, the State did not vigorously contest the existence of the mitigating circumstances presented, apart from a battle of the experts on whether the Carrs actually presented evidence of demonstrable brain abnormalities. Rather, the State focused its argument on the *weight* the jury should give the proposed mitigators. *Third*, the parties' closing arguments, the final factor under *Boyde*, properly emphasized each juror's role to act individually and independently to consider all mitigating evidence.

Applying the *Boyde* standard and factors here, there is no reasonable likelihood that jurors applied the instructions to prevent the consideration of any relevant mitigating evidence, or to prevent them from giving whatever individual effect they chose to such evidence. Thus, there was no Eighth Amendment violation, and the Kansas Supreme Court was wrong.

ARGUMENT

I. The Joint Penalty Phase Proceeding Did Not Violate The Eighth Amendment. Severance Decisions Are Reviewed Only For An Abuse Of Discretion And Require Defendants To Meet A High Burden Not Satisfied Here.

Despite purporting to acknowledge that severance is not constitutionally required in all capital penalty phase proceedings, the Kansas Supreme Court effectively established a *per se* rule requiring severance. Kansas will refute each of the Kansas Supreme Court's rationales for that result below. But there can be no doubt that the Kansas Supreme Court ultimately found that the failure to sever the penalty phase for these two capital defendants was Eighth Amendment error because, in that court's view, the defendants each failed to receive the "individualized sentencing" this Court has determined the Eighth Amendment requires.

The Kansas Supreme Court's ultimate conclusion appears to rest on three primary contentions. *First*, the court opined that the differentiation in the moral culpability of codefendants necessarily affects the jury's ability to individually apply *mercy* to each defendant, effectively making joinder in the penalty phase constitutionally problematic in any capital case. RC App. 407-409. *Second*, the court opined that some evidence potentially harmful to Reginald *might* not have been admitted in his sentencing proceeding had he not been joined with Jonathan. *Id.* at 409-411. *Third*, the court opined that any severance problem could not be cured by the jury instructions (which properly and explicitly informed the jury that it was to

consider each defendant and the evidence against him *individually*), allegedly because "this is a rare instance in which our usual presumption that jurors follow the judge's instructions is defeated by logic." *Id.* at 411. Thus, the Kansas Supreme Court concluded that "the penalty phase evidence simply was not amenable to orderly separation and analysis," which resulted in an Eighth Amendment violation. *Id.* at 411-412.

That conclusion is wrong as a matter of federal constitutional law for several reasons. First, codefendants will virtually always attempt to distinguish their moral culpability to avoid death sentences, and capital sentencing schemes typically permit them to do so as part of their mitigation argument. *See, e.g.*, 18 U.S.C. § 3592(a)(4) (Jury may consider as mitigating factor that "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death."). Moreover, many capital sentencing schemes, like the Kansas scheme, permit defendants to seek "mercy" from the jury and allow the jury to consider mercy. Thus, the Kansas Supreme Court's first rationale for finding an Eighth Amendment violation here effectively creates a *per se* bar against joinder in the penalty phase of capital cases under several capital sentencing regimes.

Second, the evidence about which Reginald complains was in fact offered by a witness he called; it was not elicited by the State, and ultimately the witness (his sister) equivocated significantly in her testimony. The Kansas Supreme Court recognized that the most it could say was that this evidence "might" not have been admitted if there were separate penalty proceedings, and the court further recognized the State

did nothing improper. That is not the stuff of which Eighth Amendment violations are made.

Finally, the Kansas Supreme Court did not offer anything in support of its bald assertion that here the court could not accept the presumption that jurors follow their instructions—not one sentence, not one citation, and not one shred of evidence that such a foundational presumption should be thrown out the window. Instead, the Kansas Supreme Court's finding of an Eighth Amendment violation runs contrary to almost 200 years of American legal history, and conflicts with the strong, traditional presumptions in favor of joinder in criminal cases and that juries can and do follow their instructions.

A. The Reasons Joinder Is Generally Proper And Desirable Apply Fully Here. The Eighth Amendment Does Not Create A *Per Se* Bar To Joinder In Capital Cases.

1. As A General Rule, Joinder Is Strongly Favored, And There Is No Need For A Special Or Contrary Rule In Capital Cases.

a. This Court's Cases Strongly Favor Joinder.

The Court first addressed a challenge to the joint trial of capital defendants almost 200 years ago; the Court quickly and soundly rejected the challenge. In *United States v. Marchant & Colson*, 25 U.S. (12 Wheat.) 480 (1827), the question was "whether two or more persons, jointly charged in the same indictment with a capital offence, have a *right*, by the laws of the country, to be tried severally, separately, and apart ...."

Id. at 480. Writing for the Court, Justice Story declared "it is a matter of discretion in the Court, and not of right in the parties." *Id.*

The Court found no right to compel severance in federal statutes, noting that "if the right can be maintained at all, it must be as a right derived from the common law ...." 25 U.S. at 480. The Court pointed to Hawkins, *Pleas of the Crown*, for the proposition that the common law "plainly supposes that it is in the election of the prosecutor whether there should be a joint or separate trial." *Id.* at 483. Otherwise,

> [i]f there had been any known right in the prisoner to control this election, it seems incredible that so accurate and learned an author should not have stated it, when the occasion indispensably required him to take notice of a qualification so important to his text. His silence is, under such circumstances, very significant.

Id. Thus, the Court concluded that the question of severance "is a matter of sound discretion, to be exercised by the Court with all due regard and tenderness to prisoners, according to the known humanity of our criminal jurisprudence." *Id.* at 485.

This Court's respect for the principles recognized in *Marchant & Colson* has not changed or waned over

time. Instead, the Court has reaffirmed the discretionary nature of severance decisions,[8] and continued to express a clear preference for joint trials in criminal cases generally. Most notably, perhaps, in *Zafiro v. United States*, 506 U.S. 534 (1993), the Court spoke emphatically of the "preference in the federal system for joint trials of defendants who are indicted together." *Id.* at 537. Pointing out that joint trials play a vital role and serve the interests of justice, the Court observed that "[f]or these reasons, we repeatedly have approved of joint trials." *Id.*

In *Zafiro*, the defendants urged the Court to "adopt a bright-line rule, mandating severance whenever codefendants have conflicting defenses." 506 U.S. at 538. But the Court declined to do so, because "[m]utually antagonistic defenses are not prejudicial *per se*," *id.*, and "the tailoring of relief to be granted, if any, [is left] to the district court's sound discretion." *Id.* at 539. Instead, a party seeking severance has to demonstrate serious and actual prejudice: the complainant's burden is to establish that "there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent

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[8] *See, e.g.*, *Opper v. United States*, 348 U.S. 84, 95 (1954) ("It was within the sound discretion of the trial judge as to whether the defendants should be tried together or severally and there is nothing in the record to indicate an abuse of discretion when petitioner's motion for severance was overruled.") *United States v. Lane*, 474 U.S. 438, 449 (1986) ("In common with other courts, the Court long has recognized that joint trials 'conserve state funds, diminish inconvenience to witnesses and public authorities, and avoid delays in bringing those accused of crime to trial.'") (quoting *Bruton v. United States*, 391 U.S. 123, 134 (1968)).

the jury from making a reliable judgment about guilt or innocence." *Id.*

Even when a serious risk of prejudice is shown, the Court in *Zafiro* observed that "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." 506 U.S. at 539. Moreover, the Court emphasized two additional considerations that generally weigh against severance. *First*, "it is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials." *Id.* at 540. *Second*, generally any risk of prejudice "is of the type that can be cured with proper instructions, and 'juries are presumed to follow their instructions.'" *Id.* at 540-541 (quoting *Richardson*, 481 U.S. at 211).

In other cases, the Court has emphasized that "[j]oint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit." *Richardson*, 481 U.S. at 210. But, "[e]ven apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id.*

The strong general presumption in favor of joinder, and the foundations on which it rests, are not so ephemeral that they evaporate and disappear in capital proceedings merely because codefendants may attempt to distinguish their respective moral culpability by possibly blaming each other. In fact, both this Court and the Circuits have recognized the value of utilizing a single jury for capital cases in a variety of circumstances.

b. The Court Has Recognized The Value And Propriety Of Having A Single Jury In Capital Cases Generally, And Of Joinder In The Analogous Context Of A Non-Capital Defendant Tried With A Capital Codefendant.

This Court has recognized the propriety and desirability of having a single jury hear entire capital cases, and of joinder in circumstances that raise similar considerations to those at issue in this case. First, in *Lockhart v. McCree*, 476 U.S. 162 (1986), the Court considered and rejected Eighth Amendment challenges to Arkansas' use of a "unitary jury in capital cases." *Id.* at 180. The Court noted that it had upheld the Georgia system against a similar attack in *Gregg v. Georgia*, 428 U.S. 153 (1976), and then proceeded to discuss two critical reasons why a unitary jury makes sense in capital cases: (1) "the defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase," 476 U.S. at 181; and (2) "it seems obvious that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase: if two different juries were to be required, such testimony would have to be presented twice, once to each jury." *Id.*

Second, the Court has rejected the claim that a non-capital defendant's guilt phase proceeding cannot be joined with a capital codefendant. In *Buchanan v. Kentucky*, 483 U.S. 402 (1987), a juvenile defendant was charged with non-capital murder in connection with a robbery, rape, and murder in which his adult codefendant was charged with capital murder.

Defendant argued that his Sixth Amendment jury trial rights were violated because in their joint trial he was tried by a "death-qualified" jury due to his codefendant's capital murder charge.

The Court rejected the claim, pointing out that the State has an "interest in promoting the reliability and consistency of its judicial process, an interest that may benefit the noncapital defendant as well." *Id.* at 418. The Court emphasized that '[i]n joint trials, the jury obtains a more complete view of all the acts underlying the charges than would be possible in separate trials." *Id.* Such a perspective "is particularly significant where, as here, all the crimes charged against the joined defendants arise out of one chain of events." *Id.* Furthermore, the State has a legitimate "concern that it not be required to undergo the burden of presenting the same evidence to different juries where, as here, two defendants, only one of whom is eligible for a death sentence, are charged with crimes arising out of the same events." *Id.* at 418-419.

Kansas recognizes that this case involves two capital defendants, and they are making an Eighth Amendment claim about their joint penalty proceeding, obvious factual differences from *Buchanan*. Nonetheless, the interests the Court addressed in *Buchanan* are front and center here, including the many advantages of joint trials for defendants as well as the interests of justice.

c. The Reasons For Permitting Joinder Apply Fully In Capital Sentencing Proceedings And, In Some Respects, With Special Force.

The reasons that support joinder apply with full force to capital proceedings, including capital sentencing proceedings. As this Court has recognized, "[i]n joint trials, the jury obtains a more complete view of all the acts underlying the charges than would be possible in separate trials." *Buchanan*, 483 U.S. at 418. Such a perspective "is particularly significant where, as here, all the crimes charged against the joined defendants arise out of one chain of events." *Id.* Furthermore, the State has a legitimate "concern that it not be required to undergo the burden of presenting the same evidence to different juries where, as here, two defendants ... are charged with crimes arising out of the same events." *Id.* at 418-419.

Moreover, "[j]oint trials generally serve the interests of justice by avoiding inconsistent verdicts and enabling more accurate assessment of relative culpability—advantages which sometimes operate to the defendant's benefit." *Richardson*, 481 U.S. at 210. But, "[e]ven apart from these tactical considerations, joint trials generally serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *Id.* Furthermore, "it seems obvious that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase: if two different juries were to be required, such testimony would have to be presented twice, once to each jury." *Lockhart*, 476 U.S. at 181.

Even when a risk of prejudice from joinder is shown, this Court in *Zafiro* observed that "less drastic measures, such as limiting instructions, often will suffice to cure any risk of prejudice." 506 U.S. at 539. Indeed, generally any risk of prejudice "is of the type that can be cured with proper instructions, and 'juries are presumed to follow their instructions.'" *Id.* at 540-541 (quoting *Richardson*, 481 U.S. at 211).

The Circuits have recognized that the Eighth Amendment does not prohibit joint capital proceedings. For instance, in *Puiatti v. McNeil*, 626 F.3d 1283 (11th Cir. 2010), the Court of Appeals noted that, "[a]lthough [defendant's] argument intertwines severance and individualized sentencing," *id.* at 1308, those are separate arguments, and the two are not incompatible:

> although Puiatti attempts to connect and intertwine severance with his constitutional right to an individualized sentencing determination, we can locate, and Puiatti has cited, no Supreme Court decision doing so. *Lockett* and its progeny do not address joint penalty phases or say that the presence of a co-defendant at a capital defendant's penalty phase trial has any Eighth Amendment implications whatsoever. None of the *Lockett* line of cases relates to severance or helps Puiatti's claim at all. Puiatti ... cites no precedent that suggests a joint penalty trial is improper for co-defendants who were properly joined in the guilt phase. The Supreme Court has never intimated, much less held, that the special concerns in capital cases require, or even suggest, that severance is necessary.

Id. at 1315. In fact, a joint proceeding "avoid[s] the inequity of inconsistent verdicts and one capital defendant going second with the benefits of previewing the State's evidence and arguments." *Id.* at 1318. Further, "the *Lockett-Eddings-Penry-Abdul-Kabir* principle that the sentencer must be allowed to consider and give effect to 'all relevant mitigating evidence,' is quite compatible with a joint trial." *Id.*

Likewise, in *United States v. Tipton*, 90 F.3d 861 (4th Cir. 1996), the Fourth Circuit readily identified several reasons supporting joinder in capital sentencing proceedings: (1) the relevant federal statutes "require that ... the penalty hearing shall be conducted before the same jury that determined guilt," so severance "would have required [multiple] separate, largely repetitive penalty hearings before this jury," *id.* at 892; (2) the same considerations that favor joinder in the guilt phase "must remain generally in play at the penalty phase," *id.*; (3) any potential risk to individualized sentencing "could not of course have been entirely removed by conducting three sequential, largely repetitive hearings before the same jury," *id.*; (4) "More critically, ... the court's frequent instructions on the need to give each defendant's case individualized consideration sufficed," *id.*; and (5) individual consideration was emphasized by "the court's submission of separate packets of penalty verdict forms for each defendant." *Id.* at 893. *See also United States v. Bernard*, 299 F.3d 467 (5th Cir. 2002) (affirming denial of motion to sever capital penalty phase proceedings).

The Circuits, faithfully applying this Court's precedents, have gotten it right. The Kansas Supreme Court stands alone and was wrong.

2. Jurors Are Presumed To Follow Their Instructions, And There Is No Reason Not To Follow That Foundational Principle Here.

In concluding that reversal was required, the Kansas Supreme Court turned an unquestioned legal presumption on its head by refusing to believe the jury could follow the instructions given here, instructions that plainly required the jury to give each defendant *individualized* consideration in determining the sentences. The court's rejection of such a foundational principle is both unwarranted and contrary to the *Zafiro* holding that any risk of prejudice arising from joint proceedings generally can be cured by giving proper jury instructions. 506 U.S. at 539.

In fact, if courts begin to question the presumption that juries follow their instructions, judges will be invited by disappointed litigants to second-guess the unexplained decisions of juries. This Court has explained that "the jury system is premised on the idea that rationality and careful regard for the court's instructions will confine and exclude jurors' raw emotions." *CSX Transp., Inc. v. Hensley*, 556 U.S. 838, 841 (2009) (*per curiam*). Thus, the Court long has embraced the presumption:

> The rule that juries are presumed to follow their instructions is a pragmatic one, rooted less in the absolute certitude that the presumption is true than in the belief that it represents a

> reasonable practical accommodation of the interests of the state and the defendant in the criminal justice process.

Richardson, 481 U.S. at 211.

The presumption is not discarded or altered in capital cases: "Jurors routinely serve as impartial factfinders in cases that involve sensitive, even life-and-death matters. In those cases, as in all cases, juries are presumed to follow the court's instructions." *CSX Transp.*, 556 U.S. at 841. Moreover, this Court has applied the presumption in capital cases on a number of occasions. *See, e.g.*, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) ("A jury is presumed to follow its instructions"); *Blueford v. Arkansas*, 566 U.S. ___, 132 S. Ct. 2044, 2051 (2012) (same).

Here, in fact, the jury was explicitly instructed in ways that made clear each juror's obligation to consider the defendants individually. For example, the trial court expressly instructed the jury, at the *commencement* of the penalty proceeding, that "[i]t is the responsibility of the jury to decide the proper sentence for the *individual* defendant in these [the capital murder] counts." JA 60. (emphasis added). The trial court repeated that instruction at the end of the penalty phase as well, just before the court read the jury all of the instructions. JA 378. At the conclusion of the penalty phase, the court instructed the jury as follows:

> You must give separate consideration to each defendant. Each is entitled to have his sentence decided on the evidence and law which is applicable to him.

> Any evidence in this phase that was limited to only one defendant should not be considered by you as to the other defendant.

RC App. 501 (Instruction No. 3). Furthermore, the jury was given several individual instructions for each defendant. In other words, there was an instruction on aggravating circumstances for Reginald (Instruction No. 5, RC App. 502-03), and one for Jonathan (Instruction No. 7, RC App. 505-506). There was a mitigation instruction for Reginald (Instruction No. 6, RC App. 503-505), and one for Jonathan (Instruction No. 8, RC App. 507-508).

Finally, the verdict forms and accompanying instructions also distinguished the two defendants. First, the jury was instructed that "[w]hen considering an *individual* defendant," the jury must find that there are one or more aggravators and that they outweigh any mitigation beyond a reasonable doubt. RC App. 509 (Instruction No. 10) (emphasis added). That same instruction tells the jury that "[i]f you sentence the *particular* defendant to death," then the jury is to use Verdict Form (1). *Id.* (emphasis added). In addition, the trial court gave the jury separate verdict forms for each defendant. JA 387. There were three forms for each of the four capital murder counts. The first verdict form for Reginald, the one the jury used for all four capital counts, found specific aggravating factors, found "unanimously beyond a reasonable doubt that the aggravating circumstances found to exist outweigh mitigating circumstances found to exist," and found "the proper sentence for Reginald D. Carr is death."

JA 461-462, 465-466, 469-470, 473-474.[9] The first form for Jonathan, also the one the jury used for all four capital counts, was identical except the jury found "the proper sentence for Jonathan D. Carr is death." JA 477-478, 481-482, 485-486, 489-490.

Thus, the jury instructions and the verdict forms plainly distinguished between the two defendants, curing any risk of prejudice from joinder.[10] The Kansas Supreme Court offered no legal or logical reason for discarding the presumption in this case, nor did it point to any evidence in the record indicating or even remotely suggesting that the jury might not have followed its instructions to consider each defendant individually. Instead, the court just baldly asserted that there was a serious and presumed risk that the jurors did not follow their instructions. That is not law, nor is it traditional judicial review.

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[9] The second verdict form was to be used if the jury found that no aggravating circumstances had been proved beyond a reasonable doubt. JA 463. The third verdict form was to be used if the jury could not unanimously agree that a death sentence was proper. JA 464.

[10] Notably, this same jury already had proven its ability to distinguish between the Carrs and assess the evidence against each individually when in the guilt phase the jury acquitted Jonathan Carr of counts against him regarding the carjacking of Andrew Schreiber, but convicted Reginald. RC App. 174; JC App. 25.

3. Because There Is No Eighth Amendment Right To Have A Capital Sentencing Jury Consider "Mercy," There Can Be No Entitlement To Separate Penalty Phase Proceedings On That Basis.

The Kansas Supreme Court erred when it relied on the proposition that severance was required in order to give full effect to the jury's ability to consider "mercy" in sentencing. Again, neither defendant was prevented from presenting any allegedly mitigating evidence, or from making any and all arguments to the jury about sparing their lives, including a request for mercy. Further, the jurors were instructed to consider each defendant individually. That ought to be the end of the matter.

But the Kansas Supreme Court at least implied, if not effectively held, that because Kansas generously permits capital sentencing juries to consider "mercy,"[11] the Eighth Amendment requires that any capital codefendants in Kansas necessarily have to be sentenced separately in order for the jury to evaluate "mercy" for each individual. Such a conclusion has no basis in federal constitutional law.

First, consideration of mercy is not required by the Eighth Amendment. This Court has held that States instead constitutionally may preclude capital sentencing juries from considering "mercy," and may explicitly instruct juries that they "must not be swayed

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[11] In this case, the jury was instructed, "mercy can itself be a mitigating factor in determining whether the state has proved beyond a reasonable doubt that the death penalty should be imposed." RC App. 503-504.

by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling." *California v. Brown*, 479 U.S. 538 (1987). *See Saffle v. Parks*, 494 U.S. 484 (1990) (contention that Eighth Amendment requires that juries be allowed to base capital sentencing decision on sympathy for defendant would be a "new rule" not applicable on federal habeas review). State courts, likewise, uniformly have rejected the notion that consideration of "mercy" is a federal constitutional requirement. *See e.g. People v. Lewis*, 28 P.3d 34, 75 (Cal. 2001) (Eighth Amendment does not require an instruction stating "[i]n determining whether to sentence the defendant to life imprisonment without possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant."); *State v. Lafferty*, 20 P.3d 342, 373 (Utah 2001) (federal constitution does not require an instruction telling jurors they should be guided by mercy); *State v. Johnson*, 723 N.E.2d 1054, 1076, 1080 (Ohio 2000) (summarily finding no Eighth or Fourteenth Amendment error in instruction that "fairness" and "mercy" are to be excised from the definition of mitigating factors); *Commonwealth v. Rainey*, 656 A.2d 1326, 1333-1334 (Pa. 1995) (counsel was not ineffective for failing to request a mercy instruction since allowing the jury unbridled discretion to grant mercy would be clearly erroneous).

Second, the Kansas Supreme Court's effective holding does not follow from its apparent premise. There is absolutely nothing inconsistent about permitting the jury to consider "mercy" and conducting a joint penalty phase proceeding. Indeed, the presence of more than one defendant may in fact work to the advantage of one or more other defendants in this

regard, by helping the jury to more accurately assess the defendants' relative blameworthiness and culpability. Severance might well, in effect, work to the *detriment* of some capital defendants when it comes to "mercy." Thus, this "rationale" of the Kansas Supreme Court is inherently intertwined with that court's rejection of the foundational principle that jurors are presumed to follow their instructions which explicitly tell the jury to consider each defendant individually.

Ultimately, the Kansas Supreme Court has essentially held that the federal constitution mandates automatic severance of all capital sentencing proceedings in which a jury is permitted to consider "mercy," even though the Constitution does not require that capital juries even be allowed to consider "mercy." Such a holding extends the Eighth Amendment's "individualized sentencing" requirement well beyond the Court's precedents, and produces illogical results. The fact that Kansas gives juries broad discretion to consider mitigation should not count against Kansas in determining whether severance was constitutionally required here.

B. Severance Decisions Are Subject Only To Abuse Of Discretion Review And Require Defendants To Satisfy A High Burden, One Not Met Here By Either Carr.

This Court long has recognized that severance decisions are subject only to abuse of discretion review by appellate courts. *E.g.*, *Zafiro v. United States*, 506 U.S. 534 (1993); *Opper v. United States*, 348 U.S. 84, 95 (1954). Although the Court has not been more specific in its review of severance decisions, many Circuits have been quite clear about the high burden a defendant

challenging joinder has to meet. Reading this Court's precedents, the Circuits have stated that a "district court's decision to deny severance is 'virtually unreviewable' and will be overturned only if a defendant can demonstrate prejudice 'so severe that his conviction constituted a miscarriage of justice and that the denial of his motion constituted an abuse of discretion.'" *United States v. Fazio*, 770 F.3d 160, 165-66 (2d Cir. 2014) (internal citations omitted).

Similarly the Circuits emphasize that the defendant challenging joinder bears a "heavy burden," *e.g.*, *United States v. Thornton*, 1 F.3d 149, 153 (3d Cir. 1993); *United States v. McConnell*, 749 F.2d 1441, 1444 (10th Cir. 1984), to show "compelling, specific, and actual prejudice," *e.g.*, *Thornton*, 1 F.3d at 153; *United States v. Driver*, 535 F.3d 424, 427 (6th Cir. 2008); *United States v. Wheeler*, 802 F.2d 778, 782 (5th Cir. 1986); *United States v. Gonzalez*, 804 F.2d 691, 694-95 (11th Cir. 1986), or "real," "actual," or "clear" prejudice. *E.g.*, *United States v. Abfalter*, 340 F.3d 646, 652 (8th Cir. 2003); *McConnell*, 749 F.2d at 1444; *United States v. Clark*, 989 F.2d 1490, 1499 (7th Cir. 1993); *United States v. Pindell*, 336 F.3d 1049, 1057 (D.C. Cir. 2003).

1. Neither Carr Met The "Heavy Burden" Of Establishing "Compelling, Specific, And Actual Prejudice."

a. There Was No Compelling, Specific, And Actual Prejudice To Reginald Carr.

In reversing Reginald's death sentence based on the failure to sever the penalty proceedings, the court relied on the following factors: (1) Jonathan "continued

the pattern he had set in the guilt phase by emphasizing that [Reginald] was the more culpable actor and a negative influence in [Jonathan's] life," RC App. 406; (2) this mitigating factor created antagonistic defenses because the mitigation evidence differentiated between the brothers' moral culpability and could have impacted a juror's decision to show mercy, RC App. 407-409; (3) Jonathan's cross-examination of Temica resulted in her testimony that, during a visit she made to Reginald when he was in jail awaiting trial, he may have admitted to shooting the victims, RC App. 409-410; (4) Temica's testimony could have negated any juror's willingness to show mercy based on residual doubt regarding Reginald, or a belief that Jonathan was the shooter, RC App. 410; and (5) Jonathan's mitigating evidence could have been considered by the jury as improper, nonstatutory aggravating evidence against Reginald. RC App. 411.

None of these "rationales" or the record supports a finding that there was compelling, specific and actual prejudice to Reginald. First, reading the penalty phase transcripts and the parties' closing arguments belies the suggestions that Jonathan's defense against the death penalty was to blame Reginald, or that their defenses were inherently or even significantly antagonistic. Quite the contrary, the vast majority of the mitigation evidence was overlapping and complementary in showing and describing the childhood experiences and family circumstances that the brothers had shared. JA 79-85, 87, 92-94, 98; Sentencing Tr. Vol. 41-A, at 44-45, 63-65, 78 (mother); JA 134-135, 145-147 (sister); JA 345-346, 348-350 (cousin).

To similar effect, one forensic psychologist testified about Reginald's childhood and its effects on him, JA 224, 227-228, 234-237, 240-241; a different forensic psychologist testified about the same matters with regard to Jonathan. Sentencing Tr. Vol. 45-A at 89, 93-94, 115-116, 129-133, 136; Vol. 45-B, 11-12, 17-20. In addition, an expert opined that both Carrs showed demonstrable brain abnormalities. JA 202; Sentencing Tr. Vol. 42, at 53. No expert opined that Reginald was the more culpable actor, or that Jonathan was less culpable.

Finally, one will search the closing argument of Jonathan's counsel in vain for any suggestion that Jonathan was seeking mercy by blaming Reginald. Instead, just as Reginald did, Jonathan primarily argued that his horrible childhood and bad life experiences should sway the jury to give him a life sentence. JA 425-431.[12]

The only other "prejudice" the Kansas Supreme Court found was Reginald's complaint that his sister equivocally suggested he may have told her that he shot some or all of the victims. But it is important to remember that Temica was Reginald's witness, and he called her to testify as part of his mitigation case. Furthermore, the State did not elicit the testimony

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[12] There is absolutely no basis for the Kansas court's assertion that Jonathan's evidence might somehow have been relied upon by the jury as "nonstatutory" aggravation, not least because the jury was plainly instructed that it could consider only the aggravating circumstances the State asserted. RC App. 503, 506. Further, the court does not even identify what evidence Jonathan presented that arguably would fall into a category of "nonstatutory" aggravation as opposed to mitigation.

about which Reginald complains, and in any event Temica's testimony was vague and equivocal.

The initial, brief statements Temica made came in response to questions from Jonathan's counsel:

> Q. Did Reggie tell you [during a visit she made to him when he was in jail] he was the one who shot those people?
>
> A. Yes.
>
> Q. Did he tell you he shot all of them?
>
> A. I don't remember the conversation.

JA 158. When the State later questioned Temica she said the following:

> Q. And you told us that your brother Reginald Carr said that he personally shot these people?
>
> A. I believe I heard him tell me something like that. I don't remember.
>
> Q. You don't remember?
>
> A. Right. I believe he told me something like that, but like when he asked me who he shot and all that, I don't remember who was, you know, shot by who.

JA 180-181.

The Kansas Supreme Court recognized that the most it could say was that this evidence "might" not have been admitted if there were separate penalty proceedings, and the court further recognized that the State did nothing improper. This short and equivocal

testimony, from one of Reginald's own witnesses, testimony that very possibly would have been presented even in a separate penalty proceeding, does not meet the heavy burden of showing compelling, specific and actual prejudice to Reginald.

b. There Was No Compelling, Specific, And Actual Prejudice To Jonathan Carr.

In reversing Jonathan's death sentence, the Kansas court summarily adopted the findings it had made in Reginald's appeal, and without explanation added that the court was relying on the "family circumstances argument" raised by Jonathan, and on prejudice to Jonathan from Reginald's visible handcuffs during the penalty phase. JC App. 45.

The court's reasoning, however, is inherently flawed because the same rationales cannot be applied to both Reginald and Jonathan. Remember, it was *Jonathan's counsel* who elicited the testimony from Temica about Reginald's alleged jailhouse confession. JA 158. Necessarily, even if there was evidence of Reginald's heightened culpability presented in the sentencing proceeding, such evidence likely would have helped Jonathan, not prejudiced him.

The Kansas Supreme Court's rationales regarding Reginald utterly fail to resolve Jonathan's severance claim in his favor. Indeed, the court never articulated how the failure to sever prejudiced Jonathan in any way. Further, although the State is largely at a loss to know what the "family circumstances" argument consists of (Jonathan made no argument about "family circumstances" in his briefs in the Kansas Supreme

Court, much less in his brief in opposition to Kansas' petition for writ of certiorari in this Court), even assuming that notion is based on expert and other testimony about Reginald's and Jonathan's childhoods, the evidence also clearly differentiated between the two of them. None of the evidence about Reginald was attributed to Jonathan.

For instance, Jonathan lived with an aunt in Texas for over a year when he was nine, and then in Ohio for a portion of time during his teenage years while Reginald was in prison. In fact, this was the evidence Jonathan relied on to argue "grave emotional harm" from his separation from his family, especially his siblings, at various times in his life. Sentencing Tr. Vol. 45-A, at 106. He also presented witnesses who testified that he was a good person and good worker while in Ohio. Other witnesses who knew him from a construction job in Dodge City, Kansas, testified that Jonathan was a good kid when they knew him. Sentencing Tr. Vol. 42, at 143, 149, 160-161; Vol. 43-A, at 6. Additionally, there was evidence that Jonathan attempted to commit suicide at least once, if not twice, prior to committing the crimes in these cases. Sentencing Tr. Vol. 45-A, at 89, 104.

Finally, the Kansas Supreme Court's single, unexplained assertion that Reginald wearing visible handcuffs during the penalty phase proceeding somehow prejudiced Jonathan leads nowhere. Although this Court has held that shackling a capital defendant during the guilt phase is *per se* error, *Deck v. Missouri*, 544 U.S. 622 (2005), the same is not true of the penalty phase, which is the only phase at issue here. The Kansas Supreme Court's reference to Reginald's

handcuffs somehow prejudicing Jonathan is even more bizarre given that the Kansas court did not rely on Reginald's visible handcuffs as a justification for granting severance *to Reginald*.

Reginald's deliberate refusal to do anything to conceal his handcuffs, JA 59, did not obviously or automatically prejudice Jonathan. Instead, just the opposite seems likely: seeing Reginald's handcuffs but not seeing any restraints on Jonathan might have suggested to the jury that Jonathan was better behaved than Reginald. In closing argument, Jonathan's counsel essentially made that point: "[Jonathan] has come to court every day, *unlike his brother*. And he has treated me like a gentleman. It's been my pleasure to represent him." JA 431 (emphasis added).

Ultimately, the Kansas Supreme Court failed to articulate any reason based in the law or logic, or to identify any facts in the record, to demonstrate compelling, specific, and actual prejudice to Jonathan. Denial of Jonathan's request for severance was not error, constitutional or otherwise.

2. Any Perceived Error Here Had To Be Harmless Given The Overwhelming Evidence Against Each Carr.

Even if the failure to sever the Carrs' sentencing proceedings somehow violated the Eighth Amendment, any error was harmless. The Kansas Supreme Court could arrive at a contrary conclusion only by ignoring and discounting the overwhelming evidence of the atrocities each Carr committed against multiple victims.

In order to conclude any error was harmless, this Court merely has to review the facts of the crimes. Reginald's purported confession (as hesitatingly and equivocatingly relayed by his sister, Temica), and Jonathan's meager attempts to claim Reginald was a negative influence on Jonathan, could not have made any difference in the jury's sentencing determinations given the overwhelming evidence. As the dissent below aptly summarized:

> For more than 3 hours, Reginald and Jonathan Carr inflicted their perverse form of torture on the five victims in this case, forcing their often naked captives to commit sexual acts on one another as the two intruders watched. Holly recounted that over those 3 hours she was raped once by Reginald Carr, who after raping her, grabbed her by the back, turned her around, ejaculated into her mouth, and directed her to swallow. The jury also heard Holly describe how she was twice raped by Jonathan Carr, forced to digitally penetrate herself, and forced into sexual intercourse with Heather, Brad, Aaron, and Jason.
>
> When she was not being violated herself, Holly sat naked in a closet with her fellow captives, so terrified she wet herself, listening to Heather moaning in pain as she repeatedly was raped in the same fashion. Heather's moans caused her boyfriend, Aaron, to break down, sobbing and crying, "[T]his shouldn't happen this way." Holly performed oral sex on Jason while in the closet because one of the two

defendants threatened additional violence if the men could not get an erection.

Each victim also was forced to leave the Birchwood residence and travel alone with Reginald Carr to withdraw money from his or her bank accounts. Holly recounted her experience, explaining she was clothed only in a sweatshirt, and that Reginald Carr groped her vagina while they were in the car. Holly asked Reginald if he was going to kill them, and he said "no."

But any slight hope Holly might have had that her life and the lives of her friends would be spared was dashed when they returned to the house and Reginald Carr told Holly, "[D]on't worry. I'm not going to shoot you *yet*." Carr's threat proved true when the five victims were taken at gunpoint into the garage, and Jason, Brad, and Aaron were forced into the trunk of Aaron's car. Jonathan Carr then drove Aaron's car, with Heather seated on the passenger side, while Reginald Carr drove Jason's truck with Holly seated on the passenger side.

The defendants then took their victims to a soccer field in a remote location. They ordered the men out of the trunk and ordered Heather and Holly out of the car. Eventually, Reginald Carr and Jonathan Carr forced each of their five victims, who were naked or partially clothed, to kneel next to each other, single file, on the snow-covered ground in below freezing temperatures. As these victims did so, surely each suspected his or her fate.

> Holly testified she heard one shot, then heard Aaron pleading, and then "another shot and another one and another one" as each victim was shot, execution style, in the back of the head. Then everything went briefly gray for Holly. But even after being shot in the back of the head, Holly remained kneeling. One of the defendants kicked her in the back, causing her to fall face forward in the snow. She heard the defendants having a conversation before they drove off in Jason's truck. She felt an impact as the truck ran over her.
>
> After the two men drove off, Holly got up and checked on the others, wrapping her only remaining piece of clothing around Jason's head in a futile attempt to save his life. And then she ran—terrified, naked, bleeding, and freezing for over a mile to get help. Meanwhile, Reginald and Jonathan Carr, unaware that Holly had survived, returned to the home at Birchwood to steal belongings from the victims and beat Holly's dog to death.

RC App. 494-496.

Kansas cannot sum up the situation better than the dissenting justice did when, after reviewing the preceding evidence, she concluded:

> The majority gives lip service to the standard of review.... But it entirely fails to conduct the analysis. Had it done so, I do not believe it could arrive at any conclusion other than that the severance error, if any, had little, if any, likelihood of changing the jury's ultimate

> conclusion. Instead, the court should hold that this jury, which demonstrated its willingness to independently assess the respective culpability of each defendant, appropriately conducted the required weighing of aggravating and mitigating circumstances and concluded Reginald Carr deserved the penalty of death.

RC App. 496-497.

Any error here, even assuming error can be found, was harmless by any standard the Court might apply.

II. There Was No Reasonable Likelihood That The Jury Applied The Instructions Here To Prevent The Consideration Of Mitigating Circumstances.

Relying on its decision in *State v. Gleason*, 329 P.3d 1102 (2014), the Kansas Supreme Court ruled that the trial court's failure to affirmatively instruct the jury that mitigating circumstances need not be proven beyond a reasonable doubt was constitutional error. RC App. 445-446. In *Gleason,* the court held that because "the instructions repeatedly emphasized the State's burden to prove the existence of aggravating circumstances beyond a reasonable doubt and to prove beyond a reasonable doubt that the death penalty should be imposed," but "never informed or explained to the jury that no particular burden of proof applied to mitigating circumstances," the Eighth Amendment was violated. 329 P.3d at 1148.

The Court explained its reasoning as follows:

> [the] jury was left to speculate as to the correct burden of proof for mitigating circumstances, and reasonable jurors might have believed they could not consider mitigating circumstances not proven beyond a reasonable doubt. Thus, jurors may have been prevented from giving meaningful effect or a reasoned moral response to [the defendant's] mitigating evidence, implicating [the defendant's] right to individualized sentencing under the Eighth Amendment.

329 P.3d at 1148.

The relevant instructions in the *Carr* cases were virtually identical to those the Kansas Supreme Court found deficient in *Gleason*. Thus, the same legal arguments Kansas has made at length in its opening brief in *Kansas v. Gleason* are incorporated by reference.[13] Kansas here will only summarize those arguments and focus on facts and arguments specific to the *Carr* cases.

Nothing in this Court's precedents holds that the Eighth Amendment mandates an instruction affirmatively informing a capital sentencing jury that mitigating circumstances are *not* subject to any particular burden of proof. The Constitution only requires that capital sentencing juries be allowed to consider and give effect to all relevant mitigating evidence. *Blystone v. Pennsylvania*, 494 U.S. 299, 307 (1990). So long as they do not prevent juries from

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[13] See Kansas Opening Brief in *Kansas v. Gleason*, at 23-42.

considering relevant mitigation, the States "are free to determine the manner in which a jury may consider mitigating evidence." *Kansas v. Marsh*, 548 U.S. 163, 171 (2006). Thus, to the extent the Kansas Supreme Court held that the Eighth Amendment requires a jury in a capital sentencing proceeding to be *affirmatively instructed* that mitigating circumstances need not be proven beyond a reasonable doubt, that ruling is erroneous.

Even if such an instruction were required as a matter of Kansas law, that circumstance would not establish an Eighth Amendment violation. Instead, the controlling constitutional standard is articulated in *Boyde v. California*, 494 U.S. 370 (1990): "the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.*

The *Boyde* Court relied on three factors to decide whether the jury likely understood the instruction to prevent the consideration of mitigating evidence. *First*, the Court analyzed the language of the instructions and concluded that there was no reasonable likelihood that jurors would have read the challenged instruction to prevent consideration of any mitigating circumstances. *Id.* at 381-382. *Second*, the Court considered the actual evidence presented, pointing out that the defendant had offered considerable mitigating evidence with no opposition from the prosecution. *Id.* at 384. *Third*, the Court considered the arguments of counsel, and noted that the prosecutor never suggested that the mitigation evidence in question could not be considered. *Id.* at 385. Putting these considerations

together, the Court concluded that there was no reasonable likelihood the jury understood the instructions to prevent the consideration of relevant mitigating evidence.

Consideration of the three *Boyde* factors here leads to the inevitable conclusion that the jury instructions were constitutionally sound. As in *Gleason*, the jury was told that the "State has the burden to prove beyond a reasonable doubt that there are one or more aggravating circumstances and that they outweigh mitigating circumstances found to exist." RC App. 501 (Instruction No. 4). Critically, the jury was told in detail that it had complete freedom to consider and assess mitigating circumstances:

> The determination of what are mitigating circumstances is for you as jurors to decide under the facts and circumstances of this case. Mitigating circumstances are to be determined by each individual juror when deciding whether the State has proved beyond a reasonable doubt that the death penalty should be imposed. The same mitigating circumstances do not need to be found by all members of the jury in order to be considered by an individual juror in arriving at his or her sentencing decisions.

RC App. 504 (Instruction No. 6).

The instructions on their face thus emphasize that jurors may consider virtually anything as mitigation, and that such circumstances are "to be determined by each individual juror." Nowhere do the instructions ever suggest that a burden of proof applies to mitigation. To the contrary, the fairest reading of them

is that determining and considering mitigation is within the unfettered discretion of each juror.

Indeed, there does not even have to be evidence *at all*, because the instruction also informed the jury that "[y]ou may further consider as a mitigating circumstance any other factor which you find may serve as a basis for imposing a sentence of less than death." RC App. 505. As a result, the instructions would permit a juror to vote for a life sentence even if virtually no mitigation evidence was presented, so long as the juror concluded that "any other factor" such as "mercy" or almost anything else outweighed any aggravating factors.

Moreover, at least three state supreme courts have reviewed virtually identical instructions and concluded that the most natural reading of such instructions is that there is *no* burden of proof for mitigation, not that the jury would be confused and think that a "beyond a reasonable doubt" standard applies. *People v. Welch*, 976 P.2d 754, 797 (Cal. 1999) ("because the trial court instructed specifically that the reasonable doubt standard applied (partially erroneously) to aggravating factors, and mentioned nothing about mitigating factors, the reasonable juror would infer that no such reasonable doubt standard applied to mitigating factors"); *Dawson v. State*, 637 A.2d 57, 64-65 (Del. 1994) ("in the absence of express guidance concerning the proper burden of proof to establish the existence of mitigating circumstances," court would *not* "assume that the jury applied the same 'beyond a reasonable doubt' standard of proof that it was instructed to use in determining whether the State had established the existence of statutory aggravating circumstances");

Matheney v. State, 688 N.E.2d 883, 902 (Ind. 1997) ("All instructions to a jury on reasonable doubt place that burden on the State," and thus "[t]here is no inference in any portion of a trial that defendant's evidence comes under that scrutiny.").

Second, in its argument to open the penalty phase, the State expressly told the jurors they had considerable discretion to consider mitigation, broadly defined: "mitigators" are "whatever they choose to prove or show to lessen or to change any culpability under the death penalty statute." JA 62. Indeed, the State made clear that "[a]nything, in fairness, may be considered as extenuating or reducing the degree of culpability or blame which justifies a sentence of less than death ...." JA 63-64.

Similarly, Jonathan's counsel told the jury that "[m]itigating evidence is what you decide it is. You decide how much mitigating evidence is worth." JA 68. And he emphasized the individualized nature of each juror's consideration: "what's important to one juror about mitigating might not be important to another." *Id.*

The State did not vigorously contest the existence of most of the mitigating circumstances presented. Apart from a battle of experts on the question whether either Carr presented actual scientific or medical evidence of demonstrable brain abnormalities, the State's argument focused almost entirely on the *weight* the jury should give the proposed mitigators. In fact, the State's case-in-chief in the penalty phase consisted entirely of resting on the evidence the State presented in the guilt phase. The State offered no new evidence or

witnesses to support its proof of aggravating factors. *See* JA 73-74.

The Carrs presented extensive evidence of their childhoods and how their lives paralleled risk factors the United States Department of Justice had identified in people who commit violent crimes. JA 408-409. This evidence included domestic violence in their home, alcohol and drug abuse by their parents, being abandoned, emotional detachment of their mother, family history of mental illness, and beatings they received when they misbehaved. JA 409-412, 415-417, 428, 430.

Reginald presented evidence of his early sexual conduct and drug dealing. JA 414. He further presented evidence that he tried to be a good father and that his children loved him. JA 418. And he emphasized that he would spend the rest of his life in prison if the jury chose to let him live. JA 420-421.

Jonathan presented evidence that he suffered when sent to another state to live with his aunt after he was accused of rape in the third grade. JA 427. He also presented evidence that he tried to commit suicide, perhaps twice, had a learning disability, and had no serious criminal record prior to these crimes. JA 428, 430. Jonathan also presented witnesses who remembered him as a good person growing up. JA 431-432. Finally, Jonathan reminded the jury that he would spend at least 50 years in prison if the jury spared his life. JA 432-433.

The only real point of contention regarding the evidence was the claim made by both Reginald and Jonathan that they had demonstrable brain

abnormalities. Their expert, Dr. Preston, a retired doctor who was qualified as an expert in "nuclear medicine," testified about PET scans, and how they can demonstrate the presence of brain abnormalities. His opinion was that the PET scan of each Carr done in preparation for this case showed abnormal brain functioning. JA 201, 203-204; Sentencing Tr. Vol. 42, at 6-105.

The State's only rebuttal witness in the penalty proceeding, and its only rebuttal evidence, was Dr. Pay, a neuroradiologist, who testified about PET scans and whether those of the Carrs in fact showed brain abnormalities. He disagreed with Dr. Preston's conclusions, testifying that he had consulted with a number of his colleagues and their consensus was the PET scans showed each Carr had a normal brain. JA 370-371; Sentencing Tr. Vol. 46, at 34-90.

Finally, the parties' closing arguments (the third *Boyde* factor), also made clear the jurors' responsibility to consider all of the mitigating evidence, broadly defined, and did nothing to give the impression mitigation could not be considered unless proven beyond a reasonable doubt. The State acknowledged that there had been "quite a bit of [mitigation] evidence." JA 392. The State reiterated that what counts as a mitigating circumstance is "[s]omething for the jury to decide." JA 396. The State certainly challenged the weight to be given mitigation evidence in comparison to the heinous nature of the crimes. *E.g.*, JA 398-399. But with the exception of the brain abnormality dispute, the State did not genuinely challenge the existence of the mitigating circumstances upon which either Carr relied. Rather, the State asked

the jury to consider whether anything either Carr presented reduced his "degree of moral culpability." JA 435. The State argued that the death penalty was appropriate for each Carr because the aggravating circumstances outweighed "any and all mitigation." JA 404-405, 434-436, 442-443.

Reginald's counsel emphasized that "[i]t is all for you to consider ... whether you want to give [any particular mitigating circumstance] any weight." JA 408. Likewise, Jonathan's counsel emphasized that "it is for you to decide how much impact a bad family life has." JA 426.

Applying *Boyde*, there is no reasonable likelihood the jurors applied the instructions in this case to prevent the consideration of any relevant mitigating evidence either Carr presented, or to prevent the jurors from giving whatever individual effect they chose to such evidence. Certainly, no reasonable juror would have understood these instructions to prevent consideration of mitigating circumstance unless such factors were proven beyond a reasonable doubt.

Ultimately, there is no basis in this Court's precedent, in logic, or in the record for the Kansas Supreme Court's Eighth Amendment rulings.

CONCLUSION

Kansas requests that the Court reverse the Kansas Supreme Court on both questions presented.

Respectfully submitted,

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
STEPHEN R. MCALLISTER
Solicitor General of Kansas
(Counsel of Record)
KRISTAFER R. AILSLIEGER
Deputy Solicitor General
NATALIE CHALMERS
Assistant Solicitor General
DAVID LOWDEN
Chief Assistant District Attorney
18th Kansas Judicial District
120 S.W. 10th Ave., 2nd Floor
Topeka, KS 66612
(785) 296-2215
steve.mcallister@trqlaw.com

Counsel for Petitioner

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